

STATE OF HAWAII

WILLIAM D. HOSHIJO,
Executive Director, on behalf
of the complaint filed by DEL
M. SCOTTO

JANENE CARACaus,

Respondent.

[illegible]

I hereby certify that this is a true and correct copy of the original file at the RIWAII County Clerk's Office.

[Signature]

attending the hearing, presided.

Chairperson Coral Wong Pietsch was not present due to her work with the Iraqi Reconstruction Authority and will not participate in the case.¹

I. HEARINGS EXAMINER'S DECISION

The Hearings Examiner made the following salient findings of fact and conclusions of law. Scotto rented a room in a house at 150 Chong Street in Hilo owned by Caracaus in February 2005. During Scotto's tenancy, Caracaus did not reside in the house because of her work as a traveling nurse in Los Angeles (from February to July 2005) and Honolulu (from July to November 2005). From July to November 2005, Caracaus would visit the house from 1 or 2 times a month and stay in one of the bedrooms.²

In early October 2005 during a visit, Scotto showed Caracaus the results of a PSA test and said that he thought he had

¹In light of Chair Pietsch's decision not to participate in the case, Caracaus' Motion to Recuse her is moot. Because Caracaus' Motion was based in part on Chair Pietsch's military service, prior to commencing oral argument the Commission advised Caracaus and McBrearty that Commissioner Valencia had served in the military and that the Commission would entertain an oral motion to recuse him, should she desire to do so. McBrearty advised that Caracaus' Motion was based on their understanding that Chair Pietsch is an active member of the military and, therefore, she had no objection to Commissioner Valencia sitting on the case.

²Beginning in November 2005, Caracaus did not visit the house because she began attending medical school in Mexico.

prostate cancer. Caracaus, a registered nurse, also believed that Scotto had prostate cancer. Caracaus told Scotto that he would get weaker and needed someone to care for him. She suggested that he move back to California to be closer to his family or that he hire a home health nurse to care for him. Scotto told Caracaus that he did not want to move back to California and could not afford to hire a nurse.

During visits in July through October 2005, Caracaus observed Scotto using marijuana while drinking alcohol and taking prescription medications for a back injury from a motorcycle accident. Scotto told Caracaus that he had a medical marijuana permit from California.³ Scotto did not get a Hawaii permit to use medical marijuana until November 30, 2005. Caracaus was concerned that Scotto was abusing prescription and illegal drugs, which affected his ability to care for himself. She felt that she could lose her nursing license if authorities discovered illegal drug use on the premises.

On October 16, 2005, Caracaus wrote a letter to Scotto terminating his tenancy:

I have done a lot of thinking about your recent tests and considering the fact that you will be needing further treatment, I think it best that you return to California or somewhere where there will be someone to

³The California permit would not authorize Scotto to use marijuana in Hawai'i.

help you through whatever treatment you decide on.

Of course, this is your decision but effective December 1, I will have to rent the apartment to another family. I appreciate all you have done for me and I like you very much, but there is still quite a bit of work needing to be done and I should not expect you to be able to tackle this monumental job.

You must take my word for it that you will get weaker and you will then be in a situation where you cannot do anything. I have seen many cases of cancer in my experience as a nurse.

The letter was left in Scotto's room where he found it.

Based on the Findings of Fact, the Hearings Examiner made the following Conclusions of Law:

The Commission has jurisdiction over this case. Caracaus does not qualify for the exception in HRS § 515-4(a)(2), which provides: "Section 515-3 does not apply ... [t]o the rental of a room or up to four rooms in a housing accommodation by an individual if the individual resides therein." Caracaus was a traveling nurse during Scotto's tenancy. Although Caracaus would visit the house for 1-2 days per month during July to November 2005, she did not live in the house.

Caracaus terminated Scotto's tenancy because of his "disability" as defined in HRS § 515-2:

[H]aving a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment. The term does not include current illegal use of or addiction to a controlled substance or alcohol or drug use that

threatens the property or safety of others.

Scotto had cancer. He was tired, fatigued and slept most of the day. Scotto was disabled because his cancer substantially limited his ability to stand, walk, take care of himself and work.

It is an unlawful discriminatory practice for a landlord to evict a person because of disability. HRS § 515-3⁴ provides in relevant part:

It is a discriminatory practice for an owner or any other person engaging in a real estate transaction ... because of disability ...

- (1) To refuse to engage in a real estate transaction with a person;
- (2) To discriminate against a person in the terms conditions, or privileges of a real estate transaction

Caracaus knew of Scotto's cancer when she sent him the eviction notice. The eviction notice shows that Caracaus was terminating Scotto's tenancy because of his cancer and concerns that he would not be able to care for himself. This constitutes direct evidence of disability discrimination.

Caracaus also believed that Scotto was abusing prescription drugs and using illegal drugs. The Hearings Examiner found that Caracaus "credibly testified that she felt Complainant's illegal drug use would hinder him from taking care of himself, and that

⁴HAR § 12-46-305 is essentially the same as HRS § 515-3.

she did not want to lose her nursing license because of illegal drug use in her house." This constitutes a legitimate, nondiscriminatory reason for the eviction.

The Hearings Examiner found that there are both discriminatory and nondiscriminatory reasons for the eviction. Under HAR § 12-46-317(2), if a protected basis is any part of the reason for the adverse action, a discriminatory practice has occurred. The Hearings Examiner concluded that Caracaus is liable for violating HRS § 515-3 and HAR § 12-46-305.

The Hearings Examiner did not award any damages and ordered equitable and injunctive relief requiring Caracaus to: 1) cease and desist from discriminating against all other tenants and persons on any protected basis, including disability; 2) adopt a written nondiscrimination policy within 90 days of the final decision; and 3) post such policy in a conspicuous place at 150 Chong Street and at any rental unit owned and operated by her in the State of Hawaii.

II. EXCEPTIONS OF THE PARTIES

In the exceptions and oral argument, the Executive Director argued that Caracaus did not evict Scotto for legitimate nondiscriminatory reasons, damages should be awarded to Scotto for Caracaus' disability discrimination, and Caracaus should be required to publish legal notice of her violation of the law.

The Commission accepts the determination that Caracaus' reasons for evicting Scotto included concern for his use of illegal drugs because the Hearings Examiner had opportunity determine Caracaus' credibility on the matter. The Commission also agrees that Hearings Examiner's Recommended Order granting the injunctive and declaratory relief is appropriate and proper under the facts of this case.

In the exceptions and oral argument, Caracaus argues that Scotto was not disabled because his cancer was not terminal. Although the diagnosis that his prostate cancer was terminal did not come until after the eviction, a person does not have to have terminal cancer in order to be considered disabled under the law. Cancer is a physical impairment which can substantially limit one or more major life activities. The Hearings Examiner found that Scotto was disabled because he was substantially limited in his ability to stand, walk, take care of himself, and work. The Commission accepts the determination that Scotto was disabled.⁵

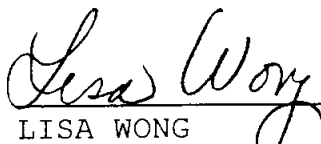
IV. ORDER

Accordingly, after reviewing the written exceptions, the

⁵Caracaus' termination letter also shows that she regarded Scotto as having an impairment which substantially limited one or more major life activities. HRS § 515-2. Based upon his diagnosis of cancer, Caracaus felt that Scotto needed help in caring for himself, which is a major life activity.

oral argument and the entire record herein, the Commission hereby adopts the Hearing's Examiner's Findings of Fact and Conclusions of Law and Recommended Order.

DATED: Honolulu, Hawaii, June 22, 2007.



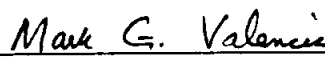
LISA WONG
Acting Chairperson



SARA BANKS
Commissioner



LESLIE ALAN UEOKA
Commissioner



MARK G. VALENCIA
Commissioner

Notice: Under H.R.S. § 368-16(a), a complainant and respondent shall have a right of appeal from a final order of the Commission in the circuit court for the circuit in which the alleged violation occurred or where the person against whom the complaint is filed, resides, or has the person's principal place of business.

Under H.R.S. § 91-14(b), proceedings for review shall be instituted in the circuit court within thirty days of service of a certified copy of the final decision and order of the agency.

CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

WILLIAM D. HOSHIJO,)	Docket No.06-001-H-D
Executive Director, on)	
behalf of the complaint)	HEARINGS EXAMINER'S
filed by DEL M. SCOTTO,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
)	AND RECOMMENDED ORDER;
vs.)	EXHIBIT "1"; APPENDIX "A"
)	
JANENE CARACAUS,)	
)	
)	
Respondent.)	
)	
)	

07 MAR 13 11:25
CIVIL RIGHTS COMMISSION

HEARINGS EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

A. CHRONOLOGY OF CASE

The procedural history of this case is set forth in the attached Appendix A.

B. SUMMARY OF THE PARTIES' CONTENTIONS

The Executive Director alleges that: 1) Complainant Del M. Scotto rented a room from Respondent Janene Caracaus and during his tenancy, he was diagnosed with prostate cancer and was a person with a disability; 2) Complainant informed Respondent of

his prostate cancer; and 3) Respondent Caracaus terminated Complainant's tenancy because of this disability in violation of H.R.S. § 515-3 and H.A.R. § 12-46-305.

Respondent Caracaus contends that: 1) Complainant Scotto did not have a disability; and 2) she terminated his tenancy for other legitimate, non-discriminatory reasons.

Having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of these proceedings, this Hearings Examiner finds and concludes that Respondent had both discriminatory and legitimate, nondiscriminatory reasons for terminating Complainant's tenancy and recommends that the Executive Director be limited to declaratory and equitable relief.

II. FINDINGS OF FACT¹

1. Complainant Scotto is a 57 year old male who moved from California to Hawaii in the fall of 2004. Prior to moving to Hawaii, Complainant had been in a motorcycle accident and injured his back. In California, he was prescribed methadone, morphine and medical marijuana to treat his back pain from that accident. (Tr. at 323-325; Ex. 4)

¹ To the extent that the following findings of fact also contain conclusions

2. In January or early February 2005 Complainant saw an ad in a newspaper for a room to rent in a house located at 150 Chong Street in Hilo, Hawaii. This house is owned by Respondent Caracaus, who is a registered nurse. (Tr. at 7, 73; Ex. 10, Ex. A at 6)

3. At that time, the house at 150 Chong Street was divided into several units. The main unit, which was raised, consisted of a finished living room, kitchen, 4 bedrooms and 2 bathrooms. This unit was rented by the Tagoilelagi family from June 2005 to the present. Underneath the main unit were two unfinished units - a large studio which had been converted from a garage, and a two bedroom unit with an attached unfinished bathroom. In addition, there was a separate unit behind the house. The downstairs area also contained a common bathroom, a common living room and a common kitchen, which were shared by the tenants living in the downstairs and separate back units. During Complainant's tenancy, the units were rented by various tenants. (Tr. at 37-38, 106-107; Ex. 10, Ex. 14 at 8, 41-44, Ex. A at 7-12)

4. During Complainant's tenancy, several of Respondent's tenants had mental or physical impairments, were disabled and/or

of law, they shall be deemed incorporated into the conclusions of law.

received disability benefits. Soma Henderson, who rented the garage unit, had brain damage from a childhood drowning incident, external cognition problems, language center disorder, selective amnesia and post traumatic stress disorder; Ann Tagoilelagi had a back injury; Tagoilelagi's husband, Joe Tagoilelagi, had a severe head injury. Several of these tenants also smoked in the Chong Street house when Respondent was not present. (Tr. at 19-20, 58-60, 170-173, 189-191, 204-205, 257-258; Ex. B at 107-108)

5. From February to July 2005 Respondent Caracaus was a traveling nurse in Los Angeles and did not travel back to her Chong Street house. From July to November 2005 Respondent was a traveling nurse at Queens Hospital in Honolulu, Hawaii and visited her Chong Street house once or twice a month. From November 2005 Respondent went back to the mainland and began attending medical school in Mexico. Accordingly, from February to December 2005 Respondent did not live at her Chong Street house. (Tr. at 10-11, 34, 84; Ex. 1)

6. After calling about the room for rent at Chong Street, Henderson, who was acting as a property manager in Respondent's absence², showed Complainant the downstairs bedroom. Henderson

² After Henderson moved out of the Chong Street house in June 2005, Respondent

did not inform Complainant of any house rules regarding smoking cigarettes in the house. Complainant made a verbal agreement with Henderson to rent the room for \$450/month beginning in mid-February 2005. At that time, there was a water leak in the ceiling of the room and Complainant offered to fix it. Complainant also noticed that the bathroom attached to the other bedroom was not functional, and that in the common rooms some pipes leaked and some wires were exposed. Complainant offered to fix these too. Henderson instructed Complainant to contact Respondent about doing these repairs. After contacting Respondent, Respondent agreed to reduce Complainant's rent in exchange for these repairs. (Tr. at 7-8, 27, 36-37, 62, 169-170, 173-177, 194, 257-259, 262-263; Exs. 10, 11, Ex. A at 6-7, 15-16, 18-24)

7. In March 2005 Complainant began to feel fatigued, tired and was having problems urinating. He went to see Dr. Macario Rivera at the Hilo Veteran's Association clinic for these symptoms. Dr. Rivera checked Complainant's prostate specific antigen blood (PSA) levels, which were elevated, and suspected that Complainant had prostate cancer. Dr. Rivera then

asked Complainant to be the property manager in exchange for a reduction in rent. Complainant was the property manager for the Chong Street house from July to October 2005. (Tr. at 60-61, 125, 170; Exs. 10, 11, Ex. A at 28)

sent Complainant for further tests at Tripler Medical Center in Honolulu, which were conducted in August 2005. A biopsy was also conducted in October, 2005 which confirmed that Complainant had prostate cancer. (Tr. at 220-222, 264-265, 325-326; Exs. 4, 5, 6, Ex. B at 75-79)

8. From March to December 2005 Complainant felt tired, had no energy, lost weight, slept most of the day, and felt a more intense pain in his back and hips. He had difficulty standing, walking and urinating. Complainant also became depressed after receiving his diagnosis of prostate cancer. He could no longer work and sold his store in Honomu. To treat these symptoms, Dr. Rivera prescribed 160 mg. of methadone and morphine. (Tr. at 121-123, 178-179, 184-185, 222-225, 228-231, 248-251, 263-265, 274-277, 280-281, 283-284, 325-326, 341, 354; Exs. 5, 7, 9, Ex. 14 at 31-33, Ex. A at 32-34, 42-43, Ex. B at 117-118, 120-125)

9. During Respondent's visits to her Chong Street house during July through October 2005, Respondent stayed in the downstairs bedroom with the attached bathroom. While at the house, Respondent observed Complainant taking methadone and drinking alcohol. She also saw marijuana cigarette butts in the common living room area and suspected that Complainant was

(

smoking marijuana in the house. Ann Tagoilelagi informed Respondent that she smelled marijuana smoke in Complainant's sheets when she once washed them and often smelled marijuana from the downstairs units. Respondent asked Complainant if he smoked marijuana in the house. Complainant admitted that he did, but stated he had a medical permit to do so. Respondent asked Complainant to show her his permit, but Complainant never did. Respondent thought that even if Complainant had a valid marijuana medical use permit, his marijuana use might still be illegal under federal law. Respondent believed that Complainant was abusing prescription and illegal drugs, that this was also affecting his ability to take care of himself, and felt she could lose her nursing license if the authorities discovered illegal drug use at her house. (Tr. at 39-42, 54, 63-65, 374-375, 378-380)

10. At that time, Complainant had a valid California medical permit to use marijuana and incorrectly believed that permit enabled him to legally use marijuana in Hawaii. Complainant did not obtain a valid Hawaii medical permit to use marijuana until November 30, 2005. Prior to obtaining a Hawaii marijuana medical use permit, Complainant grew and smoked marijuana at 150 Chong Street. (Tr. at 128-129, 183, 199-200,

313, 317-321, 351-352; Ex. 8)

11. Some time in October 2005 Complainant showed Respondent the results of his PSA tests and told her he thought he had prostate cancer. Since Respondent was a nurse, Complainant asked what she thought of the test results and if she had any advice. Respondent looked over the test results and assumed that Complainant had prostate cancer. Respondent told Complainant he would get weaker and would need someone to help take care of him. She suggested that he move back to California where he had family to take care of him, or that he hire a home health nurse to take care of him in Hawaii. This was because Respondent had experience taking care of cancer patients as a nurse, and had taken care of her father when he was terminally ill. Complainant told Respondent that he did not want to move back to California and could not afford to hire a nurse. (Tr. at 15-19, 62, 70-71, 75-76, 92-93, 266, 272-274, 335-338, 364-369; Exs. 1, 10, Ex. 14 at 31, Ex. A at 29, 31, Ex. B at 81-83)

12. In mid October, 2005 Complainant decided to go on a week long inter-island cruise to take a break and to contemplate his relationship to his god and his future. (Tr. at 179, 277, 328-329; Ex. 10, Ex. A at 42)

13. While Complainant was on this cruise, Respondent decided to terminate Complainant's tenancy because: a) she felt that Complainant would get too weak from his cancer and drug use, would not be able to take care of himself and keep his room clean, and would become a burden on other tenants; b) she felt that Complainant would be too weak to complete the repairs and finishing work on the downstairs rooms; and c) she believed that Complainant was abusing prescription drugs and using illegal drugs in the house and she could lose her nursing license. (Tr. at 39-44, 52-54, 75-78, 120-121, 373-375, 380; Exs. 1, 13)

14. On October 16, 2005 Respondent wrote a letter to Complainant stating in relevant part:

I have done a lot of thinking about your recent tests and considering the fact that you will be needing further treatment, I think it best that you return to California or somewhere where there will be someone to help you through whatever treatment you decide on.

Of course, this is your decision but effective December 1, I will have to rent the apartment to another family. I appreciate all you have done for me and I like you very much, but there is still quite a bit of work needing to be done and I should not expect you to be able to tackle this monumental job.

You must take my word for it that you will get weaker and you will then be in a situation where you cannot do anything. I have seen many cases of cancer in my experience as a nurse.

Respondent wrote this letter and left it on Complainant's desk because she did not want to inform Complainant of her decision in

person. (Tr. at 13, 15, 77-78, 120; Ex. 1, Ex. 14 at 88)

15. During his inter-island cruise, Complainant's boat stopped in Hilo and Henderson picked him up and took him to the Chong Street house to drop off some things. Complainant saw Respondent's October 16, 2005 letter on his desk. Upon reading the letter, Complainant became very upset and stressed about being evicted and having to find another place to live. He felt that Respondent was being unfair and cruel in terminating his tenancy, especially after he had just been diagnosed with cancer. (Tr. at 136-137, 179-180, 196, 278-279; Ex. 14 at 89-90, Ex. A at 34-35, Ex. B at 88, 91)

16. By the end of November 2005, Complainant found a cottage to rent at Hawaiian Acres and moved there with some of his belongings. A few days after moving to Hawaiian Acres, Complainant fell and broke his hip and was hospitalized for the next four months. Thereafter, Complainant had Steve Stagg, a contractor who did some work for Respondent, move the rest of Complainant's belongings into a storage locker that Stagg was already renting. Later, Stagg informed Complainant that he [Stagg] failed to pay the storage fee and that the storage company confiscated all of Complainant's belongings. Complainant has not able to retrieve the rest of his belongings, which had a value of

between \$7,000 and \$8,000. (Tr. at 290-297, 301-303, 310-311; Ex. A at 35-36, 63-65, Ex. B at 94-95, 103-105, 113-114)

III. CONCLUSIONS OF LAW³

H.R.S. § 515-3 states in relevant part:

It is a discriminatory practice for an owner or any other person engaging in a real estate transaction . . . because of disability . . .

(1) To refuse to engage in a real estate transaction with a person;

(2) To discriminate against a person in the terms, conditions, or privileges of a real estate transaction . . .

H.A.R. § 12-46-305 states in relevant part:

It is a discriminatory practice for an owner . . . because of a person's protected basis:

(1) To refuse to engage in a real estate transaction, evict or terminate a tenancy . . .

A. JURISDICTION

Pursuant to the above, this Commission has jurisdiction over owners or any other persons engaging in real estate transactions.

Respondent argues that this Commission does not have jurisdiction over her because she falls under the exception contained in H.R.S. § 515-4(a)(2) which states:

Section 515-3 does not apply:

. . .

(2) To the rental of a room or up to four rooms in a housing

3 To the extent that the following conclusions of law also contain findings of fact, they shall be deemed incorporated into the findings of fact.

accommodation by an individual if the individual resides therein.

This same exemption is found in H.A.R. § 12-46-313(a)(2). Respondent claims that she was residing at her Chong Street house during Complainant's tenancy because it is her permanent address, she stored her and her daughter's belongings in one of the downstairs bedrooms, and she stayed in that room when she was in Hilo.

The legislative history of H.R.S. § 515-4(a)(2) characterizes this exemption as the "tight **living** exemption". (Emphasis added.) See, House Standing Committee Report 874, 1967 House Journal at 819; Senate Standing Committee Report 298, 1967 Senate Journal at 982. In addition, the legislative history of H.A.R. § 12-46-313(a)(2) states that the provision means the "rental of a room in a housing accommodation by an individual who rents the room to another, if the individual **lives** in the housing accommodation". (Emphasis added.) See, Public Hearing Notice published in the Hawaii Tribune-Herald on August 6, 1993 and accompanying Affidavit of Publication, attached at Exhibit 1. Accordingly, the exemption applies to a lessor who **lives** in the house.

In the present case, the evidence shows that Respondent Caracaus did not live at 150 Chong Street during Complainant Scotto's tenancy from February to December 1, 2005. From February

to July 2005 Respondent was a traveling nurse in Los Angeles and did not return to her Chong Street house during that period. From July to November 2005 Respondent was a traveling nurse in Honolulu and visited her Chong Street house 1-2 times per month on the weekends. In November 2005 Respondent moved back to the mainland and did not return to the Chong Street house during the remainder of Complainant's tenancy. In her August 15, 2006 Scheduling Conference Statement, Respondent admits that she "was not on the premises, so [she] could not monitor the progress of complainant's work".

I therefore conclude that Respondent does not fall under the exemption contained in H.R.S. § 515-4(a)(2) and H.A.R. § 12-46-313(a)(2) and is subject to the provisions of H.R.S. Chapter 515.

B. DISABILITY DISCRIMINATION

Housing practices motivated by consideration of a person's disability are prohibited by H.R.S. 515-3 even if a respondent was not motivated by personal prejudice or animus. See, Community Services, Inc. v. Wind Gap Mun. Authority, 421 F.3d 170, 177 (3rd Cir. 2005) (to violate the Fair Housing Act, the discriminatory purpose need not be malicious or invidious, and it is a violation to discriminate even if the motive was benign or paternalistic);

Cnty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs, 257 F.Supp.2d 208, 225 (D.D.C. 2003); U.S. v. Reece, 457 F.Supp. 43, 48 (D. Mont. 1978) (landlord's refusal to rent apartments to single women without cars in order to protect them from assault or rape in that neighborhood is intentional discrimination in violation of Title VIII despite absence of any animosity towards women or malevolent intent); see also UAW v. Johnson Controls, Inc., 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) (company's policy barring fertile women from jobs involving lead exposure is sex discrimination under Title VII despite benevolent intent).

In housing cases involving disability discrimination, the Executive Director must first show that complainant was a person with a disability and that respondent knew of the disability or could have been reasonably expected to know of it. See, Hoshijo on behalf of the complaint filed by Ramos vs. Beretania Hale et. al., Docket No. 99-001-H-D (February 28, 2000). The Executive Director then must show: (1) that a causal connection existed between the disability and the alleged discriminatory conduct; and (2) that the disability was any part of the reason for the conduct. H.A.R. § 12-46-317.

The "causal connection between the disability and the alleged discriminatory conduct" may be shown by either direct or circumstantial evidence. See, Schwemm, Housing Discrimination Law and Litigation, § 10.2 (2006). In housing discrimination cases, direct evidence may be in the form of written documents or the respondent's oral statements. Id.

If the Executive Director presents direct evidence of discriminatory intent, the burden of proof shifts to the respondent to either: a) rebut such evidence by proving that it is not true; 2) establish an affirmative defense; or 3) limit, but not avoid liability by showing mixed motives for the adverse action (i.e., showing both legitimate and illegitimate considerations behind the action). In the Matter of Shirley Mae Smith vs. MTL, Inc. et. al, Docket No. 92-003-PA-R-S (Nov. 9, 1993); Schwemm, § 10.3; see also, Shoppe v. Gucci America Inc., 94 Hawai'i 368, 14 P.3d 1049, 1059 (2000).

In housing cases based on circumstantial evidence, courts have followed the burden shifting formula developed in employment discrimination cases. Schwemm, § 10.2. In such cases, the Executive Director has the initial burden of establishing a prima facie case by showing that: a) the complainant is a person with a disability; b) the respondent knew or reasonably could have known

of the disability; c) the complainant continued to be qualified to rent the room; d) complainant's tenancy was terminated by respondent; and e) the room was available thereafter. Schwemm, supra; Shoppe, supra, at 1059-1060. Respondent can rebut the Executive Director's prima facie case by articulating a nondiscriminatory reason for the action. Id. The burden then reverts to the Executive Director to demonstrate that the respondent's proffered reasons were "pretextual" either by showing that a discriminatory reason more likely motivated the respondent or by showing that the respondent's proffered explanation is unworthy of credence. Id.

1. Whether Complainant Scotto was a person with a disability during his tenancy at Chong Street

H.R.S. 515-2 defines "disability" to mean

. . . having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment. The term does not include current illegal use of or addiction to a controlled substance or alcohol or drug abuse that threatens the property or safety of others.

The evidence shows that in March 2005, Complainant's doctor found that Complainant had symptoms of prostate cancer and suspected that Complainant had it. Complainant's prostate cancer was confirmed by tests administered in August and October 2005.

Cancer is a physical impairment. See e.g., H.A.R. § 12-46-182 (definition of "physical or mental impairment" includes cancer).

The evidence also shows that Complainant's cancer substantially limited one or more of his major life activities. Complainant testified that from March to December 2005 he felt tired, fatigued and slept most of the day. He had to sell his store because he became too fatigued to run it. Ann Tagoilelagi testified that Complainant appeared sick, very tired, often slept during the day and hardly went out. Complainant was substantially limited in his ability to stand, walk, take care of himself and work.

For these reasons I conclude that Complainant was a person with a disability during his tenancy at Chong Street.

2. Whether Respondent knew of Complainant's disability

The record shows that in October 2005 Complainant showed Respondent some of his medical records and told her he thought he had cancer. Respondent testified that after reviewing the records, she assumed Complainant had prostate cancer. Therefore Respondent knew of Complainant's prostate cancer.

3. Whether Respondent terminated Complainant's tenancy because of his cancer or for other non-discriminatory reasons

The Executive Director presented direct evidence that

Respondent terminated Complainant's tenancy because of his cancer and her concerns that he would not be able to take care of himself and complete certain repairs. In her October 16, 2005 termination letter, Respondent states:

I have done a lot of thinking about your recent tests and considering the fact that you will be needing further treatment, I think it best that you return to California or somewhere where there will be someone to help you through whatever treatment you decide on.

Of course, this is your decision but effective December 1, I will have to rent the apartment to another family. I appreciate all you have done for me and I like you very much, but there is still quite a bit of work needing to be done and I should not expect you to be able to tackle this monumental job.

You must take my word for it that you will get weaker and you will then be in a situation where you cannot do anything. I have seen many cases of cancer in my experience as a nurse.

(Ex. 1)

In addition, at the hearing Respondent testified that after learning that Complainant probably had prostate cancer, she felt sorry for him, wanted him to either move back to California so his family could take care of him or hire someone to take care of him in Hawaii, wanted him to be in an environment that provided proper care, and didn't want Complainant to depend on other tenants to take care of him. (Tr. at 75-76, 365, 377-378) Thus, while Respondent may have been motivated by genuine concern for

Complainant's welfare, she nonetheless terminated his tenancy because of his cancer and her belief that he would not be able to take care of himself. I therefore conclude that Respondent terminated Complainant's tenancy because of his disability.

4. Whether Respondent also terminated Complainant's tenancy for other legitimate nondiscriminatory reasons

Respondent contends that she terminated his tenancy for other nondiscriminatory reasons, specifically because: a) he smoked in the house; b) he was unclean; c) he failed to complete certain repairs; and d) he used illegal drugs. I conclude that while Respondent also terminated Complainant's tenancy because he was using illegal drugs, she did not terminate his tenancy for the other proffered reasons.

The evidence shows that many of the tenants at Chong Street smoked in the house and Respondent did not evict them. I therefore conclude that this was not a legitimate reason for Respondent's decision to terminate Complainant's tenancy.

The evidence also shows that Complainant was not unclean and that other tenants did not clean up after him. (Tr. at 109-110, 285-286; Ex. 14 at 20-22, Ex. A at 34) In addition, the evidence shows that while Complainant was on his cruise, Respondent had her boss and his wife stay in Complainant's room while they were

vacationing in Hilo. (Tr. at 277-278; Ex. B at 111-113) I therefore conclude that Complainant's lack of cleanliness was not a legitimate reason for Respondent's termination of his tenancy.

Furthermore, the evidence shows that performing and completing certain repairs was not a condition of Complainant's rental agreement. Complainant offered to help Respondent do certain repairs, and Respondent reduced his rent for the expenses he incurred. Respondent did not require him to complete the repairs as a condition of his rental agreement. (Tr. at 176-177, 258, 262-263; Ex. A at 15-16, 18-24, 42)

The weight of the evidence, however, shows that Respondent believed Complainant was abusing prescription drugs and using illegal drugs at the Chong Street house, and that during his tenancy, Complainant was illegally growing and smoking marijuana at the house. While Complainant had a prescription to take methadone and morphine and was taking the prescribed amount, he did not obtain a Hawaii prescription and medical use certificate to grow and smoke marijuana until November 2005. Although the Executive Director alleges that Complainant had a valid California certificate for medical marijuana use, pursuant to H.R.S. § 329-121 through -123 and H.A.R. § 23-202-6, Complainant was required to have a valid Hawaii certificate. Respondent credibly testified

that she felt that Complainant's illegal drug use would hinder him from taking care of himself, and that she did not want to lose her nursing license because of illegal drug use in her house. I therefore conclude that this was a legitimate, nondiscriminatory reason for terminating Complainant's tenancy.

C. LIABILITY

Under H.A.R. § 12-46-317(2), if a protected basis is any part of the reason for the adverse conduct, a discriminatory practice has been committed. In the present case, Respondent knew of Complainant's prostate cancer and one of the reasons why she terminated his tenancy was because she felt his cancer would cause him to become too weak to take care of himself, that he would then impose on other tenants, and that he would not be able to complete the repairs to the house. I therefore conclude that Respondent is liable for violating H.R.S. § 515-3 and H.A.R. § 12-46-305.

D. REMEDIES

Because Respondent had both discriminatory and legitimate nondiscriminatory reasons for terminating Complainant's tenancy, the Executive Director is limited to declaratory and equitable relief. See, In the Matter of Shirley Mae Smith vs. MTL, Inc. et.

al, Docket No. 92-003-PA-R-S (Nov. 9, 1993); 1991 Civil Rights Act, Pub. L. No. 102-166, 105 Stat. 1071 at § 107(a) (if an employer demonstrates that it would have taken the same action in the absence of the impermissible motivating factor, a court may award declaratory and injunctive relief, but it may not award damages nor require reinstatement, hiring, promotion or other similar relief).

In terms of equitable relief, the Executive Director asks that the Commission order Respondent to:

- a) cease and desist from unlawfully discriminating or retaliating against Complainant and all other tenants or individuals on any protected basis, including disability, in all matters relating to real property transactions;
- b) immediately develop and implement a written anti-discrimination policy, which is to be posted in each of the rental units at the premises and any other rental unit owned or operated by Respondent;
- c) post all notices that the Commission may publish or cause to be published setting forth requirements for compliance with civil rights laws or other relevant information that the Commission determines necessary to explain those laws in a conspicuous place at the premises and any other rental unit owned or operated by Respondent in the state of Hawaii; and
- d) publish the results of the Commission's investigation in a press statement provided by the Commission in at least one newspaper published in the state of Hawaii and having a general circulation in Honolulu, Hawaii in such manner and for such time as the Commission may order, but not less than once in the Sunday edition and once in that following week.

I recommend that the Commission direct Respondent to adopt a written nondiscrimination policy within 90 days after the final decision in this case. The Commission should also direct Respondent to post such policy in a conspicuous place at 150 Chong Street and at any other rental unit owned or operated by Respondent in the state of Hawaii. Because Respondent also had a legitimate, non-discriminatory reason for terminating Complainant's tenancy, I do not recommend that the Commission require Respondent to publish a public notice of its decision.

IV. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondent Janene Caracaus violated H.R.S. § 515-3 and H.A.R. § 12-46-305 when she terminated Complainant Del M. Scotto's tenancy because of his disability.

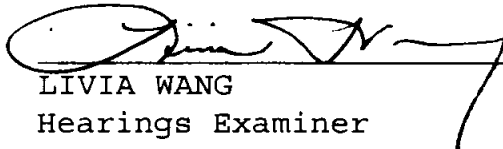
For the violation found above, I recommend that pursuant to H.R.S. § 368-17, the Commission should order:

1. Respondent to cease and desist from discriminating against all other tenants or individuals on any protected basis, including disability, in all matters relating to real property transactions;
2. Respondent to adopt a written nondiscrimination policy within 90 days after the final decision in this case;

3. Respondent to post such policy in a conspicuous place at 150 Chong Street and at any other rental unit owned or operated by Respondent in the State of Hawaii.

Dated: Honolulu, Hawaii, March 13, 2007.

HAWAII CIVIL RIGHTS COMMISSION



LIVIA WANG
Hearings Examiner

PUBLIC HEARING NOTICE

Pursuant to provisions of Chapter 91, Hawaii Revised Statutes (HRS), and all other laws applicable thereto, the Department of Labor and Industrial Relations, Civil Rights Commission, will hold a public hearing to consider proposed rules that add a new subchapter to implement state law prohibiting discrimination in real property transactions to the existing administrative rules.

The hearing will be held at 1:30 p.m. on Tuesday, September 7, 1993 at the Conference Room, Hawaii Civil Rights Commission, 888 Millilani Street, 2nd Floor, Honolulu, Hawaii.

The proposed rules add a new subchapter to implement Chapter 515, HRS, Discrimination in Real Property Transactions. The Legislature in Act 171, SLH 1992, amended Chapter 515 to conform state law to federal Fair Housing Law, Title VIII of the Civil Rights Act of 1968, as amended. Chapter 515 and the proposed rules will make state law substantially equivalent to federal Fair Housing Law. The Department of Housing and Urban Development (HUD) will decide whether to certify that Hawaii law is substantially equivalent to federal law. Certification will enable the Hawaii Civil Rights Commission to conduct investigations of complaints alleging violations of state and federal law.

§12-46-301 describes the purpose of the subchapter is to implement the law prohibiting discrimination in real property and real estate transactions toward the goal of eliminating such discrimination. The examples used are to provide guidance to the public and only illustrate a particular point or principle in the rules and should not be taken out of context as statements of policy. The commission will interpret the rules consistent with the examples but will review each case on an individual basis to seek an equitable application of the subchapter.

§12-46-302 establishes the definitions that the commission will use in this subchapter.

§12-46-303 provides that the subchapter will be liberally construed according to the fair import of the terms toward the goal of eliminating discrimination in real estate transactions.

§12-46-304 establishes the requirements for the keeping of records by persons engaging in real estate transactions. Records shall be kept for one year after the record is made or after the occurrence of the real estate transaction practice, policy, or action, whichever is later. The rule applies to the lease or rental of a housing accommodation in a building, which has four or more housing accommodations, or a housing accommodation which is owned by a person who owns three or more housing accommodations. The rule also applies to other transactions, not involving the lease or rental of housing accommodations. If a complaint or civil action has been filed, records shall be preserved until final disposition of the complaint or action. If records, required to be preserved, are destroyed or unavailable, it may be presumed that the evidence contained in the records was adverse to the interest or position of the respondent.

§12-46-305 lists the discriminatory practices which are prohibited if done because of a person's race, sex, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection.

§12-46-306 lists the discriminatory practices which are prohibited if done because of a person's disability.

§12-46-307 lists the discriminatory practices which are prohibited if done because of a person's familial status.

§12-46-308 lists the discriminatory financial practices which are prohibited if done because of a person's race, sex, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection.

§12-46-309 provides that representations regarding changes in the composition of the owners or occupants in the block, neighborhood, or area in which real property is located, or representations regarding changes affecting property values, an increase in the crime rate, or a decline in the quality of schools, which are made for the purpose of inducing a real estate transaction because of a person's race, sex, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection constitute a discriminatory practice if the person making the representation may financially benefit from the transaction, regardless of actual financial gain.

§12-46-310 lists the discriminatory practices which constitute unlawful interference, coercion, or intimidation if done by a person, or two or more persons in conspiracy. It is discriminatory to retaliate, threaten, or discriminate against a person because of the exercise or enjoyment of any right granted or protected by this subchapter, or because the person has opposed a discriminatory practice, or made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this subchapter. It is discriminatory to aid,

abet, incite, or coerce a person to engage in a discriminatory practice. It is discriminatory to interfere with any person in the exercise or enjoyment of any right granted or protected by this subchapter, or with the performance of a duty or the exercise of a power by the commission. It is a discriminatory practice to obstruct or prevent a person from complying with this subchapter or an order issued thereunder. It is discriminatory to intimidate or threaten any person engaging in activities designed to make other persons aware of rights granted or protected by this subchapter or encouraging such other persons to exercise such rights. It is discriminatory to threaten, intimidate, or interfere with persons in their enjoyment of a housing accommodation, or visitors or associates of such persons because of the person's protected basis.

§12-46-311 provides that it is a discriminatory practice to attempt to commit directly or indirectly a discriminatory practice. It is also a discriminatory practice for a party to a conciliation agreement to violate the terms of the agreement.

§12-46-312 prohibits restrictive covenants and conditions which are based upon a person's race, sex, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection. It allows restrictions, based upon religion, on real property held by a religious institution and used for religious or charitable purposes.

§12-46-313 lists the exemptions from the discriminatory practices listed in sections 306, 308, and 307 for rental of a housing accommodation in a building which contains housing accommodations for not more than two families, where the lessor resides in one of the housing accommodations, and the rental of a room in a housing accommodation by an individual who rents the room to another, if the individual lives in the housing accommodation. Exempts housing for older persons from the provisions against discrimination because of familial status and age.

§12-46-314 allows religious institutions to give preference to members of the same religion in real estate transactions conducted for charitable or religious purposes.

§12-46-315 requires the commission to notify a contracting agency of the state or county if the commission has found that a respondent, in the course of performing a contract or subcontract with the state or county, has engaged in a discriminatory practice. Unless the finding is reversed on judicial review, the finding is binding on the contracting agency. Upon notice, a contracting agency may take appropriate action, including termination of all or part of the contract, and assisting agencies of the state and counties to refrain from entering into further contracts, extensions, or modifications of existing contracts until the commission is satisfied that the respondent will carry out policies in compliance with this subchapter.

§12-46-316 establishes who may be held liable for discriminatory practices under this subchapter. A person is liable for any of its acts which constitute a discriminatory practice. A person may be liable for the acts of agents or persons acting on their behalf. The commission will examine the circumstances of the particular agency or employment relationship and job functions of the agent or person acting on behalf of such person. A person may be liable if he or she knew or should have known about harassment because of a person's protected basis done by other persons residing in other housing accommodations in the same building and did not take immediate and corrective action. In determining liability, the commission will consider the extent of knowledge, control, and any other legal responsibility the person may have with respect to the conduct of the other persons engaging in the harassment.

§12-46-317, establishes the causation standard that the commission will use in determining whether a discriminatory practice constituting disparate treatment has been committed.

§12-46-318 lists the defenses which may be raised in complaints of real estate transaction discrimination.

Interested persons are urged to present their oral and written testimony before the date of the public hearing. Such testimony may be sent to the Executive Director, Civil Rights Commission, 888 Millilani Street, 2nd Floor, Honolulu, Hawaii 96813. Copies of the proposed rules will be mailed at no cost to interested parties by calling 588-8636. Neighbor Islands may call 1-800-488-4644 ext. 6-8636. Special accommodations (i.e. sign language interpreter or taped materials) can be made if requested one week in advance of the public hearing by calling the Commission at the above numbers.

DAYTON M. NAKANELUA

Director of Labor and Industrial Relations

(9242—Hawaii Tribune-Herald: August 6, 1993)

AFFIDAVIT OF PUBLICATION

State of Hawaii)
) SS:
County of Hawaii)

LEILANI K. R. HIGAKI, being first
duly sworn, deposes and says:

1. That she is the BUSINESS MANAGER of
HAWAII TRIBUNE-HERALD, LTD. a
newspaper published in the City of HILO
State of Hawaii.

2. That the PUBLIC HEARING NOTICE - the Department of Labor
and Industrial Relations, Civil Rights Commission, will hold a public
hearing to consider proposed rules, etc.,
of which a clipping from the newspaper
as published is attached hereto, was published in said newspaper on the following
date(s) August 6, 19 93 (etc.).
#9242

Leilani K. R. Higaki

Subscribed and sworn to before me

this 16th day of August, 19 93.

Charles H. J. Ogata

Notary Public, Third Circuit,
State of Hawaii

My commission expires October 1, 1995

APPENDIX A

On January 19, 2006 Complainant Del M. Scotto filed a complaint against Respondent Janene Caracaus alleging disability discrimination. On January 23, 2006 HCRC investigator supervisor Carolyn Vierra left a message on Respondent's cellular phone stating that a complaint had been filed against her and requesting an address where the complaint could be sent. On January 24, 2006 a copy of the complaint was sent to Respondent Caracaus at her permanent address at 150 Chong Street, Hilo Hawaii 96720 by certified mail¹. The complaint was returned "unclaimed". On January 26, 2006 Respondent telephoned Vierra and left a phone message containing a phone number for Vierra to call. That day, Vierra telephoned Respondent and left a message directing Respondent to call investigator Constance De Martino. On January 27, 2006 De Martino spoke with Respondent, who stated that she was living in Mexico and would provide a fax number so that the complaint could be faxed to her. Thereafter, Respondent did not provide a fax number or address to which a copy of the complaint could be sent to her.

¹ At the January 5, 2007 hearing on Respondent's Motion to Dismiss, Respondent admitted that the 150 Chong Street address is her permanent residence address.

On May 16, 2006 the Executive Director sent, by certified mail, its Notice of Finding of Reasonable Cause to Believe that Unlawful Discriminatory Practices have Been Committed to Respondent at her Chong Street address. Included with that notice was a notice of right to elect to file a civil action in lieu of an administrative hearing. These notices were returned "not deliverable as addressed - unable to forward".

On May 31, 2006 the Executive Director sent, by certified mail, a final conciliation agreement to Respondent at her Chong Street address. This agreement was returned "unclaimed" with a forwarding address at P.O. Box 431767, San Ysidro, Calif. 92143-1767. The Executive Director re-sent, by certified mail, the final conciliation agreement to Respondent at the San Ysidro post office box address. This mail was returned "refused".

On July 2, 2006 the Executive Director served the final demand letter and final conciliation agreement on Ann Tagoilelagi, Respondent's property manager, at 150 Chong Street. On July 6, 2006 Respondent telephoned Enforcement Attorney Frank Kim to discuss these documents and confirmed that she could receive mail at her San Ysidro post office box address. On July 13, 2006 Respondent wrote to Kim and

informed him that she would not agree to the proposed conciliation agreement.

On July 18, 2006 the complaint was docketed for administrative hearing and a Notice of Docketing of Complaint and Notice of Scheduling Conference and Order were issued. On August 2, 2006 the Executive Director filed its Scheduling Conference Statement. On August 15, 2006 Respondent filed her Scheduling Conference Statement by email. On August 16, 2006 a Scheduling Conference was held. Participating were Enforcement Attorney Frank Kim and Respondent. A Scheduling Conference Order was issued on August 22, 2006.

By email dated August 19, 2006 Respondent filed her naming of witnesses. Pursuant to the Scheduling Conference Order, on August 25, 2006 the Executive Director filed its naming of witnesses as well as copies of the factual documents and Complainant's medical records in its investigation files. These documents were also sent to Respondent by mail to her San Ysidro post office address.

On October 10, 2006 Respondent spoke to the secretary of this Hearings Examiner by telephone and stated that she wanted to remove this case to federal court. By emails dated October 12, 2006 this Hearings Examiner notified

Respondent of the procedure to request of notice of right to sue from the Executive Director pursuant to H.R.S. § 515-9 and H.A.R. § 12-46-20. On October 28, 2006 Respondent filed a Removal of case to United States District Court and a Motion to Dismiss Case with the United States District Court, District of Hawaii. On November 6, 2006 the United States District Court denied these motions.

On November 8, 2006 the Executive Director sent Respondent a copy of Complainant's Department of Veteran Affairs Rating dated March 10, 2006, which Complainant had produced and referred to in his August 21, 2006 deposition. By email dated November 19, 2006 Respondent named additional witnesses.

On November 22, 2006 this Hearings Examiner issued an order directing the Executive Director to provide a copy of Complainant's August 21, 2006 deposition transcript to Respondent upon payment of copying costs. On December 12, 2006 this Hearings Examiner issued an order directing the Executive Director to provide a copy of Complainant's December 1, 2006 deposition transcript, as well as the medical records produced at that deposition, and a copy of

Ann Tagoilalelagi's November 30, 2006 deposition transcripts upon payment of copying and mailing costs.²

On December 12, 2006 a Notice of Hearing and Notice of Pre-Hearing Conference were issued. By emails dated December 27, 2006 Respondent filed her Pre-Hearing Conference Statement and notified this Hearings Examiner and Mr. Kim that she would be represented by Jenean McBrearty. On December 27, 2006 the Executive Director filed its Pre-Hearing Conference Statement and its exhibits. A Pre-Hearing Conference was held on January 5, 2007 at the Employment Security Appeals Referees Office, 830 Punchbowl Street, room 429, Honolulu, Hawaii and by telephone conference. Participating were: Respondent's representative Jenean McBrearty, Respondent and Enforcement Attorney Frank Kim.

By email dated December 19, 2006 Respondent filed a motion to dismiss this case. On December 29, 2006 the Executive Director filed its Memorandum in Opposition to Respondent's Motion to Dismiss. A hearing on this motion was held on January 5, 2007 at the Employment Security Appeals Referees Office, 830 Punchbowl Street, room 429,

² This was in lieu of Respondent having to purchase copies of the deposition transcripts from the court reporting company, by special arrangements made with that company.

Honolulu, Hawaii and by telephone conference. Participating were: Respondent's representative Jenean McBrearty, Respondent and Enforcement Attorney Frank Kim. An order denying this motion was issued on January 8, 2007.

Pursuant to H.R.S. Chapters 91 and 368, the contested case hearing on this case was held on January 10, 11 and 12, 2007 at the Department of Labor Workforce Development Division Office, Kinooles Shopping Plaza, 1990 Kinooles Street #102, Hilo, Hawaii and by telephone conference. The Executive Director was represented by Enforcement Attorney Frank Kim and Complainant was present during portions of the hearing. Respondent was represented by Jenean McBrearty by telephone conference and Respondent was also present by telephone conference.

On January 13, 2007 Respondent filed her closing arguments. On January 22, 2007 the Executive Director filed its closing argument and Respondent filed her supplemental closing arguments.

By email dated January 23, 2007 Respondent moved to strike the testimony of Soma Henderson. By email on that same date, this Hearings Examiner denied Respondent's motion to strike Soma Henderson's testimony.

On January 25, 2007 Respondent moved to reopen the contested case hearing to take further testimony. On February 1, 2007 the Executive Director filed its memorandum in opposition to Respondent's motion to reopen hearing. On February 26, 2007 this Hearings Examiner issued an order denying Respondent's motion to reopen hearing.